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Supreme Court of the United States

October Term, 1958

No. 424

JAMES E. McDANIEL,

Petitioner,

against

M/S LISHOLT, her engines, etc. and A. S. LISE, her owner,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, James E. McDaniel, prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above cause on July 10, 1958.

Opinions Below

The opinion of the United States District Court for the Southern District of New York (Edelstein, J.), is set forth at pages 10a-28a of the appendix to the petitioner's brief filed in the Court of Appeals, reported in 155 F. Supp. 619.

The opinion of the United States Court of Appeals, not yet reported, is made a part of the appendix to this petition.

Jurisdiction

The jurisdiction of this Court is based upon the provisions of 28 U. S. C. 1254 (1).

Jurisdiction in the District Court was based upon admiralty 28 U. S. C. 1333.

Questions Presented

Petitioner brought suit in admiralty for $200,000 damages for injuries alleged to have been caused by the unseaworthiness of respondent's vessel and by the negligence of her owner and operator (2a).*

Respondent answered denying that the unseaworthiness of its vessel or the negligence of her owner and operator caused libelant's injury. It pleaded contributory negligence and assumption of risk as separate defenses (6a).

The Court of Appeals held that:

(1) The warranty of seaworthiness extends "to shore-based workers only if they are doing work traditionally done by seamen."

As to petitioner, the court concluded "though his being aboard may have been of incidental benefit to the ship, his purpose in being there was to protect the Canal Zone from fires. His presence aboard the ship cannot be explained on the theory that he was performing any duty within the traditional or customary scope of activity of the crew." (Appendix to this petition page 16.) Therefore he is not protected by the warranty.

(2) Since petitioner was a fireman by calling he could not recover on the ground of the owner's negligence. While

* Numbers refer to pages in the stenographic minutes of the trial. Numbers followed by the letter "a" refer to pages in the Appendix to petitioner's brief in the Court of Appeals.

standing fire watch he was a licensee and "accordingly the owner has no greater duty than to refrain from the infliction of wilful or wanton injury," citing its decision in *Kermarec* v. *Compagnie Generale Transatlantique*, 2d Cir., 245 F. 2d 175, cert. granted 355 U. S. 902; No. 22 on the calendar of this Court.

The decision of the Court of Appeals presents the following questions:

1. Whether a single member of a fire department serving aboard ship as a fire watch and assisting stevedores engaged in removing stores from the vessel's refrigerated rooms is entitled to a warranty that such rooms are seaworthy?

2. Whether a single member of a fire department serving aboard as a fire watch and assisting stevedores engaged in removing stores from the vessel's refrigerated rooms is owed the duty of reasonable care?

Statement of Case

There was no controversy in respect to the facts.

At about 12:20 A. M. February 6, 1954, the M/S LISHOLT, a Norwegian-flag dry cargo vessel, while tied up at a dock in the Panama Canal Zone caught fire. The fire department of the Canal Zone Government was called to fight the fire, which was considered extinguished at 8:00 A. M. the next morning. The captain of the fire department and his fire-fighting crew left the vessel at that time. A number of the crew and the Master also went ashore during the day.

At 4:00 P. M., eight hours later, petitioner went aboard the vessel to serve as a fire watch. He was twenty-six years old and had been a member of the Zone fire department for about six months. He was the only member of the fire department aboard.

At the same time there were aboard several members of the crew and a gang of stevedores, who had been engaged by the ship's agent with the consent of the Captain to remove the ship's stores from its refrigerated rooms. At about 5:30 an explosion occurred in the refrigerated rooms resulting in the death of four stevedores and one chemist employed by the Panama Canal Company and injuries to eleven stevedores and the petitioner. Petitioner was subsequently hospitalized for many days with severe burns resulting in permanent disabilities.

After the explosion, there was an investigation by the Board of Local Inspectors of the Canal Zone Government. By stipulation, a transcript of the testimony then taken together with exhibits was used by the parties.

The following facts relate to the unseaworthy condition of the vessel and the negligence of her Master and crew which directly caused petitioner's injuries.

About 10 A. M. the Chief Steward and Chief Cook had inspected the freeze box (34). When they opened its door they got "a kind of smoke or gas right up against us, so we had to move back. We couldn't push through in the beginning" (35). This was reported to the Master before 11 A. M. (44, 49).

Prior to 11 A. M. the Master talked with the Chief Officer, Chief Steward and the ship's agent and it was decided to take the provisions off "as soon as it was safe" (43). The Master then believed the conditions were such that no one "could go down there" (45).

The Master made no inspection of the area, nor ordered anyone else to do so. Nor did he indicate in any manner how the freeze box was to be made "safe". No other ship's officer inspected the chill room or freeze box between the fire and the explosion. They left the matter of unloading the stores to the Chief Steward (39, 40; 43, 44).

At 11:30 A. M. the stevedores were told in the presence of the ship's agent that the gas they observed in the refrigerated space was harmless (217; 220).

At about 3 P. M. the discharging of stores commenced.

Meanwhile, at approximately 4:00 P. M., petitioner boarded the vessel to act as a fire watch.

Rule 45 of the Rules and Regulations Governing Navigation of the Panama Canal and Adjacent Waters provides:

> "Protection against fire: A vessel lying at any wharf in the Canal Zone shall at all times keep a satisfactory watch for fire * * * ".

Sometime after 4:30 P. M. and before the explosion, the stevedore foreman complained to the ship's agent about the condition of the freeze box. The agent asked if a chemist had been sent for and blowers set up. He was told that lines had been laid for the blowers but they were not in operation.

Throughout the day the Chief Steward and the Chief Cook worked and smoked in the area and so did others.

Shortly before the explosion, a stevedore foreman refused to enter the freeze box because "there was an awful odor of gas in there". Conditions in the area were so uncomfortable the stevedores stopped their work.

A few minutes before the explosion, petitioner was asked by a stevedore foreman to join him in an inspection of the chill room and freeze box. Petitioner accompanied him and proceeded into the freeze box where he noted a strong odor and suggested that they leave. Leaving the freeze box and while in the chill room a flash explosion ensued in which petitioner was severely burned and the stevedore at his side was killed. Three other stevedores were killed and a number injured.

The Court found that as a direct result of the fire the cork insulation in the interior wall of the freeze box had been smoldering progressively throughout the day, creating an explosive gas (19a) and concluded that:

> "The smoldering in the cork insulation in the wall of the chill and freeze boxes was an unseaworthy condition, as was the explosive atmosphere created thereby." (23a)

Throughout the afternoon and until the moment of the explosion, the Chief Steward, the Chief Cook and others were permitted to and did smoke in the area (15a; 37, 38; 47).

It is a fair inference that this combination of accumulating explosive gas in a confined area and smoking by the stevedores and the crew produced the explosion and libellant's injuries.

Reasons for Granting the Writ

1. The decision of the Court of Appeals equates petitioner with the plaintiff in the *Kermarec* case, *supra*. Certiorari was granted, 355 U. S. 902 at page 178 and it is now No. 22 on the calendar of this Court. In both cases it held the claimants were licensees and therefore not entitled to the protection of the warranty of seaworthiness and were owed no duty other than to refrain from wanton or wilful negligence.

As to *Kermarec*, he "did not make any contribution to the ship's safety, preservation or progress; he did not submit his life and safety to the ship as a seaman does; he did not load her for a voyage as a stevedore does; consequently he does not have any right to recover for unseaworthiness." (245 F. 2d, p. 176)

As to petitioner, "although his being aboard may have been of incidental benefit to the ship, his purpose in being

there was to protect the Canal Zone from fires. His presence aboard the ship cannot be explained on the theory that he was performing any duty within the traditional or customary scope of activity of the crew". (App. to this petition, p. 16)

In denying petitioner the right to recover on the ground of the owner's negligence the Court of Appeals applied the same rule in both cases citing the *Kermarec* case as authority for its ruling in the instant case.

The decision of this Court in the *Kermarec* case might well call for a reversal of the decision in the instant case.

2. The decision is in conflict with the decisions of this Court relating to the doctrine of seaworthiness.

> *Seas Shipping Co. Inc.* v. *Sieracki*, 328 U. S. 85;
> *Pope & Talbot, Inc.* v. *Hawn*, 346 U. S. 406.

Subsequent to the decision of this Court in the *Sieracki* case, the Second Circuit chose to construe that decision narrowly and refused to extend the rule to cover harbor workers other than stevedores. *Guerrini* v. *United States*, 2 Cir., 167 F. 2d 352.

This Court's decision in the *Hawn* case made that position untenable, but it would seem that the majority of the judges sitting in the Second Circuit now seek to give a limited meaning to the *Hawn* case. Their view is that since *Hawn's* work was in aid of loading operations the *Sieracki* rule does not extend to all harbor workers aboard ship but is still limited to workers who are performing essential ship's service of a kind thought to have been formerly performed by the crew. *Halecki* v. *United New York & New Jersey S. H. P. Ass'n*, 2 Cir., 251 F. 2d. Certiorari was granted April 28, 1958 and the case is now No. 56 on the calendar of this Court.

The debate revolves about the meaning of the language used by this Court at page 413 in *Hawn*:

> "The ship on which Hawn was hurt was being loaded when the grain loading equipment developed a slight defect. Hawn was put to work on it so that loading could go on at once. There he was hurt. His need for protection from unseaworthiness was neither more nor less than that of the stevedores then working with him on the ship or of seamen who has been or were about to go on a voyage. All were subjected to the same danger. All were entitled to like treatment under law."

Petitioner submits that a fair reading of that decision embraces all workers aboard a vessel in navigable waters with a legitimate purpose who are "subjected to the same dangers" and therefore are "entitled to like treatment under the law." And this is true regardless of the name of their trade or calling.

This concept of the range of the warranty's "humanitarian policy" has led Courts to extend it, not alone to crew members, stevedores and carpenters, but also to a watchman, *Ross* v. *Steamship Zeeland*, 4th Cir., 240 F. 2d 820 (1957), and to a member of the United States Army, *Caudill* v. *Victory Carriers*, 149 F. Supp. 11 (1957).

At the time petitioner was injured, there were aboard members of the crew, stevedores and a chemist. At the moment of the explosion, petitioner, the chemist and a stevedore were engaged in the same service, inspecting the refrigerated space, serving the same purpose of enabling the off-loading of the ship's stores to continue. By some miracle no crew member was injured. The stevedore at petitioner's side and the chemist were killed. Other stevedores were killed and a number injured. Concededly the tragedy resulted from the unseaworthiness of the refrigerated area.

Does not a fair reading of the decisions in the *Sieracki* and *Hawn* cases indicate that in these circumstances the owner was liable to all of those injured or to none?

Is the performance of work "traditionally done by seamen" a *sine qua non* to recovery on the theory of seaworthiness?

Must the shoreside worker be employed by an independent contractor who in turn has contracted with the ship to perform "work traditionally done by seamen"?

3. At the present time there is an important conflict between the Second and Third United States Circuit Courts of Appeal. In the instant case the Second Circuit has applied its ruling in *Berge* v. *National Bulk Carrier Corp.*, 2d Cir., 251 F. 2d 717, where the Court refused to extend the warranty to a worker engaged in making major repairs. However, in *Read* v. *United States*, 3rd Cir., 201 F. 2d 758, in similar circumstances exactly the contrary conclusion was reached.

4. The Court's holding that petitioner was not doing work traditionally done by seamen was arbitrary with no evidence to support it.

Petitioner was unquestionably doing a seaman's work. In the first place, a ship is required by the regulations of the Canal Zone to maintain a fire watch when in Canal Zone waters (56). It is, of course, true—as the Court of Appeals noted—that the purpose of this rule is the protection of the Canal Zone, but it does not make maintenance of a fire watch any the less seaman's work when a ship is in Canal Zone waters.

In the second place, maintenance of a watch is historically not only seamen's work but, because of the perils of the sea, perhaps the most important single feature of seamen's work. That this is so is evidenced by the fact that a seaman's tour of duty on board ship is known as a "watch". To suggest that a man on watch aboard a ship is not doing traditional seamen's work is, petitioner submits, a most violent and extraordinary misstatement of the immemorial duties of a seaman.

Surely, it was arbitrary to hold that in discharging that duty petitioner was a mere licensee and his rights were to be determined as though he were *fighting a fire on land* (28a).

5. This Court has never passed upon the question of the status of a member of a fire department acting aboard a vessel as a fire watch.

Wherefore, petitioner respectfully prays that a writ of certiorari issue under the seal of this Court to review the judgment and decree herein of the United States Court of Appeals for the Second Circuit, to reverse said judgment and decree and to remand the cause to the District Court to proceed according to law.

October 6, 1958.

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Counsel for Petitioner.

APPENDIX

Opinion of United States Court of Appeals for Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 353—October Term, 1957.

(Argued May 9, 1958. Decided July 10, 1958.)

Docket No. 24914.

JAMES E. McDANIEL,

Libelant-Appellant,

against

M/S LISHOLT, her engines etc. and
A. S. LISE, her owner,

Respondent-Appellee.

Before:

WATERMAN and MOORE, *Circuit Judges*,
and GALSTON, *District Judge*.

Appeal from the United States District Court for the Southern District of New York, David N. Edelstein, *Judge*.

James E. McDaniel appeals from the dismissal on the merits of his libel against the M/S LISHOLT and her owner, A. S. Lise, to recover damages for personal injuries. Affirmed.

MACLAY, MORGAN & WILLIAMS, New York, N. Y. (Hugh S. Williamson and William I. Stoddard, New York, N. Y., of Counsel), *for libellant-appellant.*

HAIGHT, GARDNER, POOR & HAVENS, New York, N. Y. (Francis X. Byrn and James M. Estabrook, New York, N. Y., of Counsel), *for respondent-appellee.*

GALSTON, *District Judge*:

Libelant appeals from a final decree of the United States District Court for the Southern District of New York entered October 31, 1957 after a trial, dismissing the libel.

Libelant brought suit in admiralty for $200,000 damages for personal injuries allegedly caused by the unseaworthiness of respondent's vessel and by the negligence of her owner and operator.

Libelant was a member of the Fire Department of the Panama Canal Zone Government. On February 6, 1954, at about 12:20 A. M., the vessel M/S LISHOLT was tied up at Dock 6, Balboa Dock, Panama Canal Zone, while oil was being pumped from ashore into fuel tanks aboard the ship. Thereafter some of the oil overflowed and ignited. The Canal Zone Fire Department was called in promptly and fought the fire. The fire was believed to be extinguished at about 8:00 A. M. on that day. At about 4:00 P. M. libelant was assigned to the vessel as a fire watcher by the Fire Department of the Canal Zone Government. His duties included guarding against any re-igniting of the blaze, taking care of any hidden fires which might have been overlooked, extinguishing fires he could reasonably handle and reporting those fires he could not handle.

Prior to the time libelant had come aboard, members of the crew of the vessel had detected an odor in the ship's refrigerator room. After libelant came aboard the ship he went to the refrigerator room and detected an odor which he believed to be ammonia gas. He then went on deck for the purpose of reporting the condition to the Fire Department. On deck he met a chemist and the stevedore foreman. These three men decided on a further investigation and the chemist and libelant went below to the refrigerator room where libelant noted the odor was stronger. He suggested that they leave. Immediately after they had left the refrigerator room a flash explosion occurred, as a result of which several persons were killed and the libelant was severely injured. The explosion resulted from the release of carbon monoxide gas caused by smouldering in the cork insulation of the refrigerator room due to the fire. There was no finding as to the actual igniting agent that caused the explosion.

The court below determined that libelant, as an employee of the Canal Zone Fire Department performing fire watch duties aboard the ship, was a licensee who was there by reason of public necessity and in the primary interests of the Panama Canal Zone.

The libelant seeks to have the court extend to him the ship owner's absolute duty to provide a seaworthy ship, a duty traditionally owed to seamen who sail with the ship and who are subjected to the perils of the sea. *The Osceola* (1902), 189 U. S. 158, 23 S. Ct. 483, 47 L. ed. 760. Following a dictum in that Supreme Court decision and influenced by a humanitarian policy, the courts have developed as part of the general maritime law a doctrine allowing recovery for injuries caused by the unseaworthiness of a vessel, imposing liability on the ship owner and the ship, and making this liability an absolute duty to provide a seaworthy ship. This doctrine has been made available to members of the crew, stevedores and shore-based workers who come aboard in the employ of inde-

pendent contractors to perform the type of work traditionally done by seamen. *Seas Shipping Co.* v. *Sieracki* (1946), 328 U. S. 85, 66 S. Ct. 872, 90 L. ed. 1099; *Pope & Talbot* v. *Hawn* (1953), 346 U. S. 406, 74 S. Ct. 202, 98 L. ed. 143; *Petterson* v. *Alaska SS. Co.* (1954), 347 U. S. 396, 74 S. Ct. 601, 98 L. ed. 798; *Halecki* v. *United New York and New Jersey Sandy Hook Pilots Ass'n* (2d Circuit), 251 F. 2d 708, cert. granted, June 9, 1958.

But the absolute liability imposed on the ship owner and ship can be extended to shore-based workers only if they are doing work traditionally done by seamen. We have stated that whether this special protection is afforded " * * * depends upon whether the work on which the plaintiff was engaged was of a kind that the crew of a vessel was accustomed to perform." *Berge* v. *National Bulk Carriers Corp.* (2d Circuit), 251 F. 2d 717, 718, cert. den'd May 19, 1958. In that case we refused to extend the warranty of seaworthiness to a shore-based rigger engaged in work designed to be a virtual rebuilding of the interior of the vessel. In *Berryhill* v. *Pacific Far East Line* (9th Circuit), 238 F. 2d 385, cert. den'd 354 U. S. 938, 77 S. Ct. 1400, 1 L. ed. 2d 1537, recovery was denied for the same reason to a workman engaged in major repairs aboard a dry-docked vessel.

Libelant was employed by the Canal Zone Fire Department and was aboard the ship in the performance of his duties to that Department rather than by any arrangement with the ship owner. Though his being aboard may have been of incidental benefit to the ship, his purpose in being there was to protect the Canal Zone from fires. His presence aboard the ship cannot be explained on the theory that he was performing any duty within the traditional or customary scope of activity of the crew. He was there not because the ship owner chose to employ him rather than a member of the crew to undertake a particular job, but rather because the Fire Department ordered him aboard to maintain safety in the Canal Zone.

In addition, it is undisputed that the vessel was unseaworthy at the time libelant went aboard. He was stationed aboard the ship because of the vessel's unseaworthiness occasioned by the fire. There can be no duty to furnish a seaworthy ship to a fireman who was on the vessel knowing it to be unseaworthy, and was on board because of its unseaworthiness.

We find, therefore, that the warranty of seaworthiness does not extend to the libelant.

Libelant claims further that he is entitled to recover on the ground of the owner's negligence. It has been generally held that a fireman entering premises in the performance of his duties is a licensee, and accordingly the owner has no greater duty than to refrain from the infliction of wilful or wanton injury on the fireman and to exercise ordinary care to avoid injuring the fireman by any affirmative and active acts of negligence. As was stated in *Kermarec* v. *Compagnie Generale Transatlantique* (2d Circuit), 245 F. 2d 175, cert. granted 355 U. S. 902, at p. 178:

> "The general rule is that the ship owner shall not wilfully or wantonly injure a licensee, or expose him to hidden perils or fail to use due care to prevent injury to him after discovering that he is in danger."

No wilful or wanton conduct on the part of the owner was proved.

Although there was in fact a peril, there was no showing that the owner had any knowledge of the conditions within the refrigerator room that gave rise to the explosion, or any opportunity to give notice to the libelant of this peril.

Moreover, as a fireman libelant assumed the ordinary risks of his calling. One of the purposes for which the libelant came aboard was to make the inspection designed to discover the condition that resulted in his injury. One cannot recover for injuries received in the performance of acts calculated to eliminate the actual cause of the in-

jury. *Byars* v. *Moore-McCormack Lines, Inc.* (2d Circuit), 155 F. 2d 587, where the court cited with approval the following language from *Mullin* v. *Genesee County Electric Light, Power & Gas Co.*, 202 N. Y. 275, at page 279, 95 N. E. 689, 690:

> "The reason for this exception to the general rule is that it would be manifestly absurd to hold a master to the duty of providing a safe place when the very work in which the servant is engaged makes it unsafe."

See also *Bruszewski* v. *Isthmian Steamship Co.* (3d Circuit), 163 F. 2d 720.

The final decree is affirmed.

Judgment

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals in and for the Second Circuit, held at the United States Courthouse in the City of New York on the tenth day of July one thousand nine hundred and fifty-eight.

Present:

HON. STERRY R. WATERMAN,
HON. LEONARD P. MOORE,
Circuit Judges.
HON. CLARENCE G. GALSTON,
District Judge.

ADM 184-203

JAMES E. MCDANIEL,
Libellant-Appellant,

v.

M/S LISHOLT, her engines, boilers, tackle, apparel, etc., and A/S LISE,
Respondent-Appellee.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the decree of the said District Court be and it hereby is affirmed; with costs to the Appellee.

A. DAVID FUSARO,
Clerk.